No. 12,641

IN THE

United States Court of Appeals

For the Ninth Circuit

AUBREY L. CHARMAN, STANLEY CUMMINGS, JOHN A. HRUTKY, and JOHN F. SCHWELLA,

Appellants,

vs.

PAN AMERICAN AIRWAYS, INC. (a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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Subject Index

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In this brief we shall discuss only the various contentions made in appellee's brief; those of our points to which appellee has not responded we shall not repeat. Nor shall we re-argue the case as a whole since we are satisfied that our opening brief does that adequately.

I.

THE FACTS.

A. THE TECHNICAL BACKGROUND.

In the opening sections of its brief, entitled "Background and Terminology" and "The Jobs Held by

Appellants'', appellee asserts substantially that scientific improvements have rendered obsolete the services performed by appellants and consequently no employment is available for appellants irrespective of any other considerations. This contention underlies much of appellee's argument and appears in one form or another in various portions of its brief.[1] The facts in this regard are not as appellee pictures them.[2] In any case this argument is not dispositive of the issue before this Court. The issue is whether or not the record below supports appellants' contentions that each of them had a contract with appellee, that appellee breached it, and that each of them suffered damages as a result theerof.

To the extent that technological improvements in the field of radio communication are involved in the case at all, the record is clear that in April of 1949, after the breach and the institution of this action, appellee entered into an agreement with the Transport Workers Union[3] which provided that the flight radio officers who were thereafter discharged should be conclusively presumed to have been discharged due to the advent of radio-telephony and should receive sever-

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[1]Appellee's Brief, pp. 2-6, 22-23.

[2]As we pointed out in our opening brief (pp. 54-56), and as the record amply bears out (Tr. 247-252), the progress of technology has not reached such a point as to permit appellee to dispense with the services of flight radio officers. On the contrary, the record is uncontradicted that as of the time of trial, some 18 months after appellee's breach of its contract and the institution of this action, appellee was employing a substantial number of flight radio officers, most of whom were junior in employment history to all appellants. (Tr. 274-275.)

[3]Def. Exh. F.

ance pay in the sum of $3,000. This agreement follows the familiar industrial pattern of providing for severance pay for employees whose services are no longer required due to the introduction of labor-saving devices. If appellee rests its case upon the observation of the trial judge quoted at page 23 of its brief, then at least appellants are entitled to severance pay which they would have gotten upon discharge had they been re-established in the Communications Department as appellee promised to do.

B. THE CONTRACTS.

In the section entitled "The Alleged Contract",[4] appellee misinterprets the contract it wrote by an undue emphasis on the word "seniority" appearing therein. Actually, the heart of appellee's promise to appellants appears in the phrase "You will *resume* your duties as flight radio officer, etc." The following phrase in the contract describes the circumstances which would obtain after appellants resumed their said duties. At no time has appellee permitted any of the appellants to resume their duties as flight radio officers, either with or without seniority.

Appellee also overlooks the real significance of the agreement of 1943 wherein appellee promised to *"re-establish"* each of the appellants in the Communications Department. This second contract could only have been taken by appellants to be (as it was) a re-

[4]Appellee's Brief, pp. 6-9.

affirmation of a promise previously made and a restatement by appellee that the position of appellants with the company was secure. If it was not the intention of appellee by its communication of 1941 to make a legally binding commitment, then it is difficult to understand the significance of the 1943 letter. If in 1941 appellee was merely expressing a hope or intention or desire, it certainly did not so indicate two years later. The letter of 1943 demonstrates, as does the statement made by Axe in 1946[5] that at no time until this litigation was instituted did appellee ever contend that its communication of 1941 was not intended by it to be a legally binding commitment.

C. THE SUBSEQUENT COLLECTIVE BARGAINING WITH THE NAVIGATORS.

In the sections entitled "Subsequent Agreement Authorized by Appellants"[6] and "Arbitration and Award",[7] appellee falls into one serious error and neglects to mention one extremely important fact.

The error is the assumption that the signing by each of the appellants of an ordinary authorization card to a trade union for collective bargaining purposes constituted the appointment of that union as an agent for the purpose of negotiating with respect to appellants' private contracts with appellee. There is nothing

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[5]Tr. 269-271.
[6]Appellee's Brief, pp. 9-11.
[7]Appellee's Brief, pp. 17-20.

either in the authorization card itself, in the conduct of the trade union involved, in the conduct of appellee, or in the conduct of appellants, to indicate that any of the parties thought or believed that by this authorization appellants were divesting themselves of control over the handling of their own contracts. The record in this case is no different from the record in *Steves v. American Mail Line,* 154 F. (2d) 24 (C.C.A. 9, 1946) and in *Agnew v. American President Lines,* 177 F. (2d) 107 (C.C.A. 9, 1949), cert. den. 70 S. Ct. 489 (1950). There is nothing here to show that the union authorization card signed by appellants was any different from the normal or usual union authorization card ever signed by any employee.

The Navigators Association grew as a result of the influx of temporary wartime employees, and all of the collective bargaining which took place between appellee and that association indicates that the problems uppermost in the minds of the parties were the problems of such employees. The very collective bargaining contract of January, 1945,[8] shows that the parties were dealing with temporary employees concerning whom appellee would "use its best efforts to place" at the conclusion of hostilities.[9] The solution of the problems of such employees was of no particu-

[8]Def. Exh. B.

[9]This is the answer to the contention (Appellee's Brief, p. 20) that appellants threw "their employment rights into the arbitration proceeding". It is clear they did no such thing and their acceptance of the award money "under protest" (Appellants' Opening Brief, p. 14) further demonstrates that to be the fact.

lar concern to appellants, since appellants did not expect to be affected by the post-war curtailment of professional navigators' jobs.

Furthermore, it is perfectly clear that the collective bargaining contract executed by the Navigators Association and appellee did not and could not constitute a novation of appellants' earlier contracts with appellee, because that agreement[10] specifically makes reference to and incorporates the company memoranda of December 20, 1944,[11] which, as we pointed out in our opening brief,[12] specifically recognizes that the obligations assumed by the parties to the collective bargaining agreement "could not, of course, be permitted to stand in the way of promotion of employees already in training for them *or otherwise entitled to prior consideration* * * *"[13] Thus, as early as December, 1944, and January, 1945, in its dealings with the Navigators Association, appellee recognized that certain of its employees were entitled to prior consideration and so drafted the contract it was executing with the Navigators Association as to prevent its infringing on the rights of such employees. Thus, explicitly, rights such as are here asserted by appellants were recognized and exempted from the operation of the subsequent collective bargaining contracts. How, therefore, those contracts or the arbitration held thereunder could be regarded as a novation of contracts which

[10]Def. Exh. B.
[11]Def. Exh. C.
[12]pp. 12-13, footnote 8.
[13]This observation concerning Defendants' Exhibit C is not even referred to in appellee's brief.

established such rights (even assuming that the agency was adequate), it is most difficult to understand.

D. THE FLIGHT RADIO OFFICERS' SENIORITY LIST.

In the section entitled "Establishment of Seniority List",[14] appellee incorrectly asserts that the "Group B" list properly applies to appellants. That it does not is seen from the following factors.

First, that list applies only to those flight radio officers "who are no longer accruing seniority". Appellants were continuing to accrue seniority because they had been promised in writing by the appellee that *they would suffer no loss of seniority* and that *they would be re-established in a grade commensurate with their length of service with appellee.* Consequently, it cannot be said that they were no longer accruing seniority. On the face of it, therefore, the contention that the description of Group B would have fitted each of appellants perfectly, is not correct.

Second, *the fact is that appellants' names were never added to the Group B list* and the reason is perfectly obvious. It is the reason we have just stated. Appellants *did not fit into that group* for only one reason: *they were continuing to accrue seniority,* and it would have been a breach of appellee's contract with appellants to have included them on that list. In any

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[14]Appellee's Brief, pp. 11-15.

case, as we pointed out in our opening brief,[15] and this argument has not even been referred to by appellee, there was no showing that any persons on the list, or the union involved, offered any objection or placed any obstacle in the way of the inclusion of appellants' names on the list after the position of non-pilot navigator was abolished.

E. THE ALLEGED OFFERS OF EMPLOYMENT.

Under the section entitled "Jobs Offered to Appellants",[16] appellee asserts that the trial Court's finding that jobs were offered to each of the appellants is supported by the evidence. We discussed the evidence in our opening brief and demonstrated that not only was there absolutely nothing in the record to support such a finding,[17] but that such a finding was contrary to the practically undisputed testimony.

The alleged offers made in March of 1949 came after the breach had occurred and the suit was filed. Appellee having breached its contract, and appellants having elected to sue for the breach thereof, appellee could not thereafter seek to destroy appellants' causes of action by a belated offer of employment. *Sobelman v. Maier,* 203 Cal. 1 (1927); *Dyer Bros. Etc. v. Central, Etc.,* 72 C.A. 202 (1925); cf. *Manus v. Bendlage,* 82 C.A. (2d) 916 (1947).

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[15]Appellants' Opening Brief, pp. 41-42.
[16]Appellee's Brief, pp. 15-17.
[17]Appellants' Opening Brief, pp. 51-54.

But more interesting is the fact that despite all of its protestations in other portions of its brief that it is prevented by operation of law (e.g., the Railway Labor Act) or the absence of available employment from offering employment to appellants, appellee had no difficulty in making such offers in March of 1949. Of course, the offers themselves did not meet appellee's obligations to appellants since instead of being offers of employment without loss of seniority or other advantage, or offers which would re-establish appellants in a grade commensurate with the length of service of each of them with appellee, the offers were merely offers of temporary employment.[18]

F. DAMAGES.

In the section entitled "Lack of Proof of Damages",[19] appellee commits the same error as it does in the discussion of the seniority list. It assumes, contrary to the record and contrary to the agreement which it made with appellants, that appellants were not to accrue seniority during the period of time they were engaged as non-pilot navigators. Based upon that assumption it concludes that none of the appellants would have had sufficient simulated seniority to justify their employment by appellee after their navigators' positions were terminated. This flies directly in the face of the agreement made by appellee that appellants

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[18]Tr. 180.

[19]Appellee's Brief, pp. 20-25.

would not suffer any loss of seniority and that they would be re-established in a grade commensurate with their length of service with appellee. The meaning of those promises is demonstrated by the appendix to our opening brief[20] which makes it clear that each of the appellants stands high upon appellee's seniority roster, and that of the 125 persons employed as flight radio officers by the appellee at the time of trial, appellants fall within the top 20%. As far as the actual damages to appellants are concerned, the record is clear that each of them suffered substantial monetary damage in the year between the time of the breach of the contract and the time the action was tried, and there was every indication that they would continue to suffer in the future.[21]

II.

THE LAW.

A. THE FINDINGS.

Appellee argues that because the trial Court made findings on every issue raised by the pleadings, the findings are proper, and that our argument that the findings are inconsistent is therefore not valid. Appellee apparently misapprehends our position. We take no issue with the fact that the trial Court found the facts specially on each issue raised by the plead-

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[20]Appendix. pp. vi and vii.

[21]These facts are pointed out in our Opening Brief, pp. 31-32, footnote 20, with appropriate transcript citations.

ings. Our contention is that the "facts" which the trial Court found cannot be sustained in the light of either the record or the decisions of the Supreme Court and the Circuit Courts of Appeals respecting such findings. The findings do not demonstrate the theory upon which the trial Court decided the case, and it is impossible to tell from them what that theory was. How can a Court find (1) that there was *no contract* and (2) that subsequent events constituted a novation *of the contract?* Or, how can the Court find (1) that there was *no contract* and (2) that thereafter the appellee *complied with the provisions of the contract* by tendering employment? Particularly, how could the Court find (1) that there was *no contract;* (2) that subsequent events constituted a *novation of the contract;* and (3) that a tender of employment satisfied appellee's obligation *under the contract?*

The authorities cited[22] concerning, on the one hand, adverse possession, and on the other hand, the payment of a debt barred by the statute of limitations, do not represent inconsistent findings such as are found in this case. Therefore, those authorities are not in point.

We do not urge as decisive the fact that counsel for appellee prepared the findings and therefore the authorities cited[23] are not germane. We do point out the findings are inconsistent, do not reveal the basis upon

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[22]Appellee's Brief, p. 29.
[23]Appellee's Brief, p. 30.

which the trial Court reached its decision,[24] and are the "delayed, argumentative and over-detailed documents prepared by winning counsel"[25] and are "but the most ultimate general conclusions of ultimate fact * * * [from which] it is impossible to tell * * * upon which underlying facts the Court relied * * *"[26]

We further point out that the findings of fact contain many conclusions of law and inferences drawn by the trial Court from the evidence before it, and consequently are subject to review by this Court.[27]

None of these contentions is answered by appellee's brief.

B. THE MEMORANDA OF JANUARY, 1941, AND APRIL, 1943, ARE ENFORCIBLE CONTRACTS.

Appellee concedes that the existence of a contract is determined by what the parties actually say rather than by what they may have meant,[28] but argues that what the parties said does not mean what the plain words used reveal. Appellee does not suggest that the words "You will resume your duties as a flight radio

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[24]As a matter of fact, insofar as one can tell from the observations of the trial judge made during the course of the proceedings before him, his comment quoted at page 23 of appellee's brief ("I can almost understand the situation, gentlemen, in relation to your jobs. I can see them fading away with this modern method.") was the real underlying basis for his decision. Yet this is not reflected in the findings. As we have pointed out above, this "finding" is not supported by the record, and in any case is not decisive of the issues here.

[25]*United States v. Forness*, 125 F. (2d) 928 (CCA 2, 1942).

[26]*Schneiderman v. United States*, 320 U.S. 118 (1943).

[27]Appellants' Opening Brief, pp. 20-25.

[28]Appellee's Brief, p. 32.

officer",[29] or "We will re-establish you in the Communication Department in a grade commensurate with your length of service with the company",[30] do not mean what they say. There is some suggestion, however, that the word "seniority" used in Plaintiffs' Exhibit 1 has some special meaning. However, the testimony of appellee's witness Fisher[31] indicates that the word was used in its ordinary normal meaning in 1941. It had reference to a preferred position based on the length of service in connection with vacations, promotion, health plan, etc., etc., and there is nothing in the subsequent contracts to show that it had any other meaning at a later date. This is the usual meaning of the term in industrial relations.

We are certain that appellee did not intend to mislead this Court by the paragraph on page 33 of its brief in which it referred to the fact that the trial Court heard the testimony concerning the meaning of the word "seniority" and "found that under the circumstances *it* 'could not reasonably be understood and actually was not understood' to have the meaning appellants now claim." For this statement appellee cites pages 48 and 50 of the transcript of record. Those pages contain Findings of Fact Nos. 6 through 8, and it is perfectly obvious from reading them that the quoted language in the finding did not refer to seniority at all, but referred to appellee's general theory that the memoranda did not constitute contracts but

[29]Plaintiffs' Exhibit 1.
[30]Plaintiffs' Exhibit 2.
[31]Tr. 215, 216, 222-223.

were merely statements of future plan or intention. Therefore, it is not correct to say, as appellee does at page 33 of its brief, that the trial Court found the word "seniority" to mean something different from what appellants now claim.

To meet the overwhelming citation of California authorities to the effect that the documents in question do constitute a legally binding contract,[32] appellee cites two cases, one from New Jersey and one from Florida, where there appears general language to the effect that a "declaration of intention" does not constitute a contract. In response we can only say that there is here obviously more than a declaration of intention. There is a legally binding commitment. In the second place, an examination of the cases cited by appellee shows how different they are from the case at bar.

In *Broadstreet National Bank v. Collier,* 112 N.J. Law 41, 169 A. 552 (1933), the plaintiff had written a letter to the defendant as follows:

> "As I advised Mr. Charles McDermott to take the mortgage to your institution in order to settle his indebtedness as well as my note endorsed there, I feel I should be taken care of in the matter * * * I trust you will appreciate my position and take care of me * * *"

To which the defendant replied:

> "I have your letter in re McDermott and shall be very glad to comply with your wishes."

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[32] Appellants' Opening Brief, pp. 25-31.

This was the entire correspondence exchanged between the parties and it is on this factual basis that the Court found no contract existed. We submit that that is certainly a far cry from the commitments made by the appellee here.

The Court in the New Jersey case said:

> "An expression of desire or hope is not of itself an offer which will become a contract upon acceptance by the adverse party."

Here there was no question of an expression of desire or hope, but rather a definite promise that appellants would "resume" their prior positions and that appellee would "re-establish" them in those prior positions.

Furthermore, in the New Jersey case, the Court pointed out that it was perfectly evident from the entire transaction that it was not in the mind of either party to change their legal relationships and that there was no consideration present. Neither of these two factors is to be found in this case.

In *Ball v. Yates,* 158 Fla. 529, 29 So. (2d) 729 (1947), cert. den. 332 U.S. 774 (1947), the question was whether or not an agency which could bind the defendant was created. In summarizing the facts the Court said:

> "It appears that *on each occasion when confronted with any suggestion that he* [the defendant] *had entered into any agreement of a contractual nature * * * he disaffirmed and disavowed.* He states his plan was to proceed so that he could

quit at any time without liability and *his conduct throughout bears this out.*" (Italics supplied.)

In the case at bar, the exact contrary is true. Here, not only did the appellee make the commitment in 1941, but it reaffirmed it in 1943,[33] and again in 1946.[34]

C. THE SUBSEQUENT COLLECTIVE BARGAINING AGREEMENT WITH THE NAVIGATORS ASSOCIATION.

Appellee argues that *Steves v. American Mail Line,* supra, and *Agnew v. American President Lines,* supra, are not applicable because the union agreement constituted a novation of the private agreements between appellee and appellants. We have already pointed out above that, first, there was no authorization on the part of appellants to the union to negotiate concerning these matters, and second, the collective bargaining contract could not constitute a novation because it expressly exempted from its operation the status of employees "entitled to prior consideration", e.g., precisely these appellants. Therefore, appellee's statement that the union agreement of January, 1945, was "wholly at variance" with the earlier memoranda[35] is an incorrect statement. It was not at variance with the earlier commitments because it expressly excluded such earlier commitments from its scope and opera-

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[33]Plaintiffs' Exhibit 2.
[34]Tr. 269-271.
[35]Appellee's Brief, p. 34.

tion. Therefore, there could be no inconsistency between the two documents and therefore the union agreement does not supersede the contract upon which appellants here base their claim.

Even if it did, the doctrine of the *Steves* and *Agnew* cases, supra, requires that this Court give full effect to private contracts entered into between appellants and appellee rather than to the terms of the subsequently executed collective bargaining agreement.

D. THE FLIGHT RADIO OFFICERS' SENIORITY LIST.

In discussing this phase of the case, appellee relies exclusively upon *Llewelyn v. Fleming,* 154 F. (2d) 211 (C.C.A. 10, 1946), cert. den. 329 U.S. 715 (1946). However, it overlooks the distinctions between that case and the case at bar, which distinctions we were at pains to point out in our opening brief.[36] The basic distinction, of course, is the fact that in the *Llewelyn* case the job which the employee was claiming was not in existence at the time the collective bargaining contract was entered into, and the employee certainly could not be regarded by virtue of the custom and understanding in the industry as having a perpetually continuing right to any jobs which might come into existence in the future. The employee in the *Llewelyn* case was in no different position from any other person employed by the company, and had no special

[36]Appellants' Opening Brief, pp. 42-47.

personal or individual commitment from the company concerning the job in question. In our case, the appellants are not relying upon a general custom applicable to all employees, but only upon definite contractual commitments to each one of them as an individual. Furthermore, in our case, the jobs in question were in existence before the commitment was made, during the time the commitment was in effect, at the time the commitment was breached, and thereafter. In our case, the appellants are not insisting that a general custom and understanding be so interpreted and applied as to give them a right to a job which came into existence years after the collective bargaining contracts were entered into. In our case, the appellants are only asking that a commitment to them which it is both legally and physically possible for appellee to honor, be honored, or that they be awarded damages for its breach.

E. CONCLUSION.

Appellee indicates in its conclusion that in the last analysis, it is not relying upon the *Llewelyn* case[37] and falls back basically upon the trial Court's "findings" first, that there was no contract, and second, that there was no damage. It makes these assertions presumably because it feels that by relying upon such "findings" it will preclude this Court from making an independent examination of the record with

[37] Appellee's Brief, pp. 43-44.

regard to those matters. But as we pointed out,[38] these "findings" do not preclude this Court from making such an independent examination. And insofar as the trial Court "found" that no contract arose, it was not making findings of fact but was drawing conclusions of law and therefore its "findings" are subject to review by this Court whether "clearly erroneous" or not. *Himmell Bros. Co. v. Serrick Corp.,* 122 F. (2d) 740 (C.C.A. 7, 1941).

We pointed out in our opening brief, based upon an abundant citation of California authorities,[39] that as a matter of law, the *only* conclusion which can be drawn from the documentary evidence is that a contract did come into effect in 1941 and was reaffirmed by appellee in 1943. Therefore, the first basis of appellee's ultimate argument must fall as a matter of law.

Secondly, we pointed out that the record is undenied that each appellant did suffer substantial financial injury in the year 1949 and thereafter, as a result of appellee's breach of its contracts.[40] Thus, the second of the arguments upon which appellee ultimately relies is also without merit.

From all of the foregoing, it appears that there is nothing in appellee's brief which mitigates against the conclusion drawn in our opening brief that the trial

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[38]Appellants' Opening Brief, pp. 21-25.
[39]Appellants' Opening Brief, pp. 25-31.
[40]Appellants' Opening Brief, p. 31, footnote 20.

Court's judgment is supported neither by the facts nor by the law, and for that reason it must be reversed.

Dated, San Francisco, California,
January 8, 1951.

Respectfully submitted,
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